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In The

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, et al.,

Petitioners

v.

HOWARD E. BRADFORD, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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INDEX

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions Involved 2

Statement of the Case 2

Argument:

I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION SINCE THE ACTION IS IN THE NATURE OF A PETITION FOR HABEAS CORPUS AND RESPONDENTS HAVE AN AVAILABLE STATE REMEDY 3

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT EXTEND SO FAR AS TO REGULATE THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE 6

III. THE VERY NATURE OF THE PAROLE GRANTING PROCESS NEGATES THE REQUIREMENTS OF DUE PROCESS 14

Conclusion 19

TABLE OF CASES

BARRADALE v. UNITED STATES BOARD OF PAROLES & PARDONS, 362 F. Supp. 338 (M.D. Penn. 1972) 9

BASKINS v. MOORE, 362 F. Supp. 187 (S.C. 1973) 4

BELL v. BURSON, 402 U.S. 535 (1971) 7

BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1972) 7

BOZELL v. UNITED STATES, 199 F. 2d 449 (4th Cir. 1952) 12

BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973) 2, 17, 18
BREST v. CICCONE, 371 F. 2d 981 (8th Cir. 1967) 12
BUCHANAN v. CLARK, 446 F. 2d 1379 (5th Cir. 1971), cert. denied, 404 U.S. 979 (1971) 12
CAFETERIA AND RESTAURANT WORKERS v. McELROY, 367 U.S. 886 (1961) 6, 14
CAGLE v. HARRIS, 349 F. 2d 404 (8th Cir. 1965) 12
CREASON v. NORTH CAROLINA BOARD OF PAROLES, ... F. 2d .... (4th Cir., June 3, 1975) 12
GAGNON v. SCARPELLI, 411 U.S. 778 (1973) 7
GOBLE v. BOUNDS, 281 N.C. 307, 188 S.E. 2d 347 (1972) 13
GODOY v. U. S. BOARD OF PAROLE, 345 F. Supp. 1292 (C.D. Cal. 1972) 14
GOLDBERG v. KELLY, 397 U.S. 254 (1970) 7
HYSER v. REED, 318 F. 2d 225 (D.C. Cir. 1963) cert. denied sub nom. THOMPSON v. UNITED STATES BOARD OF PAROLE, 375 U.S. 957 (1963) 15
JERNIGAN v. NORTH CAROLINA, 279 N.C. 556, 184 S.E. 2d 259 (1971) 4
JOINT ANTI-FASCIST REFUGEE COMMITTEE v. McGRATH, 341 U.S. 123 (1951) 6
KOYCE v. UNITED STATES BOARD OF PAROLE, 306 F. 2d 759 (D.C. Cir. 1962)) 5
MENECHINO v. OSWALD, 430 F. 2d 403 (2nd Cir. 1970), cert. denied, 400 U.S. 1023 (1971) 9, 14, 17
MORRISSEY v. BREWER, 408 U.S. 471 (1972) 7, 8, 15
PEOPLE OF THE UNITED STATES ex rel HARRIS v. RAGEN, 81 F. Supp. 608 (N.D. Ill. 1949), aff'd 177 F. 2d 303 (7th Cir. 1949) 14
PREISER v. RODRIGUEZ, 411 U.S. 475 (1973) 3
SCARPA v. U. S. BOARD OF PAROLE, 477 F. 2d 278, vacated and remanded for consideration of mootness, 414 U.S. 809 (1973) 8, 12, 13

SHERBERT v. VERNER, 374 U.S. 398 (1963) 7
SNIADACH v. FAMILY CORP., 395 U.S. 337 (1969) 7
SWEETEN v. SNEDDON, 463 F. 2d 713 (10th Cir. 1972) 14
TARLTON v. CLARK, 441 F. 2d 384 (5th Cir. 1971), cert. denied 403 U.S. 934 (1971) 12, 13
THOMPSON v. UNITED STATES BOARD OF PAROLE 375 U.S. 957 (1963) 15
THOMPKINS v. U. S. BOARD OF PAROLE, 427 F. 2d 222 (5th Cir. 1970) 12
UNITED STATES v. SUTTON, 346 F. Supp. 464 (D.C. D.C. 1972) 14
UNITED STATES BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25 (4th Cir. 1973) 12, 13
VANILLA v. MORAN, 67 N.Y.S. 2d 833, aff'd 272 App. Div. 859, 70 N.Y.S. 2d 631, appeal denied 272 App. Div. 971, 72 N.Y.S. 2d 420, appeal dismissed 297 N.Y. 593, 75 N.E. 2d 265, aff'd 298 N.Y. 796, 83 N.E. 2d 696 (1949) 5
WOLFF v. McDONNELL, 418 U.S. 539 (1974) 10

STATUTES INVOLVED

NORTH CAROLINA GENERAL STATUTES:
G. S. 15-217 4
G. S. 17-1 4
G. S. 148-58 11
G. S. 148-60 ..... 11, 13, 15
G. S. 148-62 4
NEBRASKA:
Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972) 10
UNITED STATES CODE:
18 U.S.C. § 4203 13
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 ..... 3, 5
42 U.S.C. § 1983 3

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed November 22, 1974 is not yet reported and is printed as Appendix A in the Petition for Writ of Certiorari filed herein on April 14, 1975 (P pp 9-25).

The Order of the Fourth Circuit Court of Appeals filed January 15, 1975 denying the Petition for Rehearing and Motion for Rehearing En Banc is printed as Appendix B in the Petition for Writ of Certiorari filed herein on April 14, 1975 (P pp 26-28).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for a Writ of Certiorari was granted June 2, 1975.

QUESTIONS PRESENTED

I. WHETHER PREISER v. RODRIGUEZ, 411 U.S. 475 (1973) PRECLUDES AN ACTION UNDER 42 U.S.C. § 1983 CLAIMING THE APPLICABILITY OF DUE PROCESS IN PAROLE CONSIDERATION.

II. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Howard E. Bradford and Robert E. Harris are North Carolina State Court prisoners who had been denied parole by the North Carolina Board of Paroles. With the assistance of a "penitentiary lawyer", they filed a civil rights complaint dated March 2, 1973 challenging disciplinary procedures of the North Carolina Department of Correction, indeterminate procedures of the North Carolina Department of Correction, and the parole granting and revoking procedures of the North Carolina Board of Paroles. (A pp 2-16). On May 1, 1973, without requiring an answer from the Defendants, the District Court dismissed the Complaint. BRADFORD v. WEINSTEIN, 357 F. Supp. 1127 (E.D.N.C. 1973) (A pp 17-25).

Howard E. Bradford appealed the dismissal to the United States Court of Appeals for the Fourth Circuit which, in a two-to-one decision, reversed the District Court and held that due process is required in parole consideration and that inmates

may attack the denial of due process in a suit brought pursuant to 42 U.S.C. § 1983 (P pp 9-25). The Appellees moved for rehearing and rehearing en banc. The Court voted four-to-four on Appellees' Motion to Rehear and the Motion was therefore denied (P pp 26-28).[1]

On April 14, 1975, the Petitioners filed a Petition for Writ of Certiorari in this Court to review the Opinion of the Fourth Circuit Court of Appeals and on June 2, 1975, the Petition for Writ of Certiorari was granted.

ARGUMENT

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION SINCE THE ACTION IS IN THE NATURE OF A PETITION FOR HABEAS CORPUS AND RESPONDENTS HAVE AN AVAILABLE STATE REMEDY.

It is Petitioners' contention that the Complaint filed in the District Court should be treated as a petition for writ of habeas corpus under 28 U.S.C. § 2254, rather than as a civil rights action under 42 U.S.C. § 1983, since it challenges the fact of physical confinement and seeks as relief a more speedy release from imprisonment. If Petitioners are correct in their construction of PREISER v. RODRIGUEZ, 411 U.S. 475 (1973), then the District Court lacked jurisdiction over the Respondents' action for the reason that the Respondents failed to exhaust available state remedies prior to seeking federal relief. In PREISER this Court stated that:

> ". . . when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate

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1. It is interesting to note that in the Order denying rehearing, all four judges who voted in favor of the rehearing noted their dissent on the merits from the panel decision. Thus, by the luck of the draw, the Opinion of the District Court was reversed rather than affirmed.

or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus . . ." Id. at 500.

Although Respondents are not seeking immediate release, if the relief requested by their Complaint is granted it will be necessary for Petitioners to forthwith afford the Respondents and all those similarly situated with an otherwise unnecessary review under revised parole consideration procedures. While it is true that these new hearings would not invariably result in any inmates being immediately released from confinement, the fact that these otherwise unavailable opportunities for release would be the end result of the relief the Respondents seek is sufficient to bring this case within the meaning of PREISER, because ". . . recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and to obtain future releases." 411 U.S. at 487 quoted in BASKINS v. MOORE, 362 F. Supp. 187 (S.C. 1973) at 189.

If PREISER requires that the Respondents' Complaint be treated as a petition for habeas corpus, Respondents do not have a claim for relief cognizable in federal court, since a state remedy adequate to secure the relief herein requested is available to them under JERNIGAN v. NORTH CAROLINA, 279 N.C. 556, 184 S.E. 2d 259 (1971). In JERNIGAN the Supreme Court of North Carolina was confronted with the question of whether or not there exists a procedure by which an inmate could attack an Order of the North Carolina Board of Paroles entered pursuant to the authority of N.C.G.S. 148-62 requiring that he serve the remainder of the sentence upon which he had been paroled after the completion of a new sentence imposed while he had been free on parole. Justice Sharp (now Chief Justice) in writing for the Court, found that neither the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, nor N.C.G.S. 17-1, the North Carolina Habeas Corpus statute, provided an appropriate basis for review in the circumstances of the case. However, Justice Sharp found jurisdiction to "treat

this proceeding as one instituted under the Declaratory Judgment Act. For the reasons hereinafter set out we deem this Act to provide an appropriate means of deciding this case." JERNIGAN v. STATE, supra, at p. 560.

> "The Declaratory Judgment Act (G.S. 1-253 through G.S. 1-267) provides that '[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.' G. S. 1-254. To that end the courts of record are 'empowered to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.' G. S. 1-253.
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> * * *
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> "The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights . . ."

In VANILLA v. MORAN, 67 N.Y.S. 2d 833, aff'd 272 App. Div. 859, 70 N.Y.S. 2d 631, appeal denied 272 App. Div. 971, 72 N.Y.S. 2d 420, appeal dismissed 297 N.Y. 593, 75 N.E. 2d 265, aff'd, 298 N.Y. 796, 83 N.E. 2d 696 (1949), and in KOYCE v. UNITED STATES BOARD OF PAROLE, 306 F. 2d 759 (D.C. Cir. 1962), similar results were also reached.

If PREISER requires that Respondents' Complaint be treated as a Petition for Habeas Corpus, Respondents do not have a claim for relief cognizable in a federal court, since they have available to them an effective state remedy and therefore all remedies "available in the courts of the state" have not been exhausted. 28 U.S.C. § 2254.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT EXTEND SO FAR AS TO REGULATE THE PROCEDURES FOLLOWED BY A PAROLE COMMISSION IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE.

The Respondents in this case present a broadfront challenge to North Carolina parole procedures contending that the various grounds for relief assigned by them in the Complaint in the District Court (A pp 2-16) represent violations of their rights under the Equal Protection Clause of the Fourteenth Amendment. However, the basic issue is whether the Constitution mandates the procedural due process demanded by the Respondents. In resolving this issue, it is necessary to recognize that a fundamental condition for requiring constitutional (as distinguished from statutory) due process is the existence of governmental action which threatens to destroy or impair an existing private interest. Usually such action is accomplished through an adversary proceeding in which a vital issue of fact is resolved against a person without according him the benefit of certain fundamental safeguards. The Fourteenth Amendment requires the safeguards of due process to be applied only where the state is attempting to deprive a citizen of "life, liberty or property". The procedural requirements of the due process clauses do not attach themselves to "every conceivable case of government impairment of private interest". CAFETERIA AND RESTAURANT WORKERS v. McELROY, 367 U.S. 886, 894 (1961). The interest to be protected must be one of constitutional magnitude. This Honorable Court has held that the issue of whether a litigated interest is of such magnitude as to be protected by the Fourteenth Amendment is wholly dependent upon a determination of the extent to which a citizen "will be condemned to suffer a grievous loss" as a result of an unfavorable decision in the proceeding. JOINT

ANTI-FASCIST REFUGEE COMMITTEE v. McGRATH, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in GOLDBERG v. KELLY, 397 U.S. 254, 263 (1970); also in MORRISSEY v. BREWER, 408 U.S. 471, 481 (1972).

A "grievous loss" activating due process procedures was found where welfare benefits were stopped, GOLDBERG v. KELLY, supra; where wages were garnisheed, SNIADACH v. FAMILY FINANCE CORP. 395 U.S. 337 (1969); where driver's license was revoked, BELL v. BURSON, 402 U.S. 535 (1971); where unemployment compensation was withheld, SHERBERT v. VERNER, 374 U.S. 398 (1963); where an employee holding a government created job was fired, BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1972); and where an individual's parole or probation was revoked, MORRISSEY v. BREWER, supra; GAGNON v. SCARPELLI, 411 U.S. 778 (1973). In each of the examples above, a vital interest upon which the individual had come to rely, be it welfare payments, a driver's license, a job, or conditional liberty, had been deprived, revoked, terminated or taken away without the benefit of the constitutional protection of the due process clause. This Court justifably vetoed the arbitrary procedures that had been utilized in those cases.

In MORRISSEY v. BREWER, supra, this Court applied due process to parole revocation hearings, emphasizing that the benefits of gainful employment, the enjoyments of a family and social life, and "other endearing attachments of normal life", would be denied the parolee should he lose his parole. This Court also noted the reliance of a parolee upon "at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." A revocation of conditional liberty obviously results in the loss of a freedom presently enjoyed by the paroled or probated—such a "grievous loss" that fundamental procedural safeguards must be implemented in fact finding hearings held in such cases.

However, the case at bar is clearly distinguishable from all

of the above instances. The interest which Respondents seek to have designated as constitutionally protected within the meaning of the Fourteenth Amendment "liberty" is nothing more than their hope for parole release. Respondents, in fact, have no liberty of which they are to be deprived or which is to be taken away; they suffer no loss of something upon which they have reasonably placed reliance. The Fifth Circuit Court of Appeals in a post-MORRISSEY decision held that an interest in parole release is not a right protected by the Fourteenth Amendment:

> "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protection attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status.
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> ". . . [Petitioner] Scarpa is a convicted felon currently incarcerated in prison for his past transgressions. This manifest deprivation of liberty is the result of a due process hearing. The sentencing judge mandated a possible confinement of eight years. Scarpa now attempts to equate the possibility of conditional freedom with the right to conditional freedom. We find such logic unacceptable.
>
> "If the Board refuses to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the Court . . ." SCARPA v. U. S. BOARD OF PAROLE, 477 F. 2d 278 at 282, vacated and remanded for consideration of mootness, 414 U.S. 809 (1973).

In MORRISSEY, 408 U.S. at 482, n. 8, it was recognized that there is a substantial difference in the importance of maintaining one's conditional liberty and the "mere anticipation or

hope of freedom." Therefore, it is quite evident that this Court did not equate conditional liberty with the hope of parole release.

In MENECHINO v. OSWALD, 430 F. 2d 403 (2nd Cir. 1970), cert. denied, 400 U.S. 1023 (1971), the Second Circuit Court of Appeals was faced with a contention by Menechino, a New York State prisoner, to the effect that he had a constitutionally protected right to procedural due process at a parole release hearing conducted by the New York State Board of Paroles. In MENECHINO, the Court of Appeals for the Second Circuit held that the prisoner is not entitled under the Fourteenth Amendment to procedural due process rights upon being considered by the New York State Board of Paroles for release on parole prior to termination of his court-imposed sentence.

> ". . . He is entitled only to be released after full service of his sentence less good time earned during incarceration. The Board is given absolute and exclusive discretion to decide whether or not to institute parole proceedings and, if so, whether parole should be granted to him. Appellant has been constitutionally deprived of his right to liberty for the period of his sentence. Unlike an alien seeking entry into the United States (as distinguished from a lawful resident alien), he does not qualify for procedural due process in seeking parole." (Citations omitted) MENECHINO v. OSWALD, supra, at pp. 408, 409.
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> "In the last analysis the Board's determination as to whether a prisoner is a good parole risk represents an aspect of state prison discipline, not an adjudication of rights in an adversary proceeding . . ." MENECHINO v. OSWALD, supra, at p. 412.

As the District Court in BARRADALE v. UNITED STATES BOARD OF PAROLES & PARDONS, 362 F. Supp. 338 (M.D. Penn. 1973), pointed out:

> ". . . the interest which plaintiff has in being released on parole is not one which he is presently enjoying. Unlike a parole revocation hearing where one's continued liberty is at stake, . . . a prisoner applying for parole has no right to be released until he has served his full term less his good time credits. Whether he will be released on parole prior to the expiration of his sentence is wholly within the discretion of the Board." *Id.* at 341.

In that case, as in the present one, there is no threat to an "existing private interest".

The Fourth Circuit relies upon WOLFF v. McDONNELL, 418 U.S. 530 (1974) in support of its conclusion that parole release consideration requires an application of the Fourteenth Amendment. However, in ruling that prison disciplinary proceedings are subject to basic procedural requirements due to the possibility of revocation of good time credit, this Court relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), providing for the allowance and reduction of good time. This Court stated:

> ". . . the State itself has not only provided a statutory right to good time credit but also specifies that it is to be forfeited only for serious misbehavior . . . The State itself having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the State created right is not arbitrarily abrogated. . . ." *Id.* at 557.

Thus, WOLFF is merely another instance in which this Court has required due process where the individual is to be *deprived* of something substantial, i.e., good time credit, guaranteed to him by a state statute. It is inappropriate

where, as here, no vested or absolute right is extended and then withdrawn.

The State of North Carolina does not grant the inmate a right to parole, but grants the Parole Commission the discretion to release an inmate on parole. N.C.G.S. 148-58 and N.C. G.S. 148-60. N.C.G.S. 148-58 provides:

> "All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits."

N.C.G.S. 148-60 provides:

> "The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society, or the judge, prosecuting attorneys, or jury that convicted the prisoner."

It is clear that before the Parole Commission can grant a parole under N.C.G.S. 148-60, the Commission must, in its discretion determine "the reasonable probability that the

prisoner will live and remain in liberty without violating the law [and] that the release of the prisoner is not incompatible with the welfare of society. . . ." All that an inmate has at any time before this determination is made is a mere anticipation of parole release. Such an anticipation is not an interest of "real substance within the meaning of the Fourteenth Amendment.

In TARLTON v. CLARK, 441 F. 2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971), the Fifth Circuit Court of Appeals stated:

> "By the language of Title 18 U.S.C.A. § 4203, the Board of Parole is given absolute discretion in matters of parole. The Courts are without power to grant a parole. UNITED STATES v. FREDERICK, 405 F. 2d 129 (3rd Cir. 1968). Furthermore, it is not the function of the courts to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination." 441 F. 2d 385.

This position was reaffirmed by the Fifth Circuit Court of Appeals in SCARPA v. U. S. BOARD OF PAROLE, supra, and by the Fourth Circuit Court of Appeals in U. S. BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25 (4th Cir. 1973). In U. S. BOARD OF PAROLE, supra, the Fourth Circuit notes that, "In adhering to its prior position, the Fifth Circuit was in accord with the clear weight of authority", citing BUCHANAN v. CLARK, 446 F. 2d 1379 (5th Cir. 1971), cert. denied, 404 U.S. 979 (1971); THOMPKINS v. U. S. BOARD OF PAROLE, 427 F. 2d 222 (5th Cir. 1970); BREST v. CICCONE, 371 F. 2d 981 (8th Cir. 1967); CAGLE v. HARRIS, 349 F. 2d 404 (8th Cir. 1965). "We also note that this Court [the Fourth Circuit] gave short shrift to a case of similar nature in BOZELL v. UNITED STATES, 199 F. 2d 449 (4th Cir. 1952)." U. S. BOARD OF PAROLE v. MERHIGE, supra. In CREASON v. NORTH CAROLINA BOARD OF PAROLES, ... F. 2d .... (4th Cir., June 3, 1975), the Fourth Circuit once

again reaffirms this position by stating that, "No prisoner in North Carolina has an absolute right to parole. GOBLE v. BOUNDS, 281 N.C. 307, 188 S.E. 2d 347 (1972). By statute, the right to be released on parole is discretionary. N.C.G.S. 148-60." The Court also reexpressed the view that " 'It is not the function of the Courts to review the discretion of [Parole Boards] in the denial of application for parole or to review the credibility of reports and information received by the [Parole Boards] in making [their] determination[s]'. UNITED STATES BOARD OF PAROLE v. MERHIGE, 487 F. 2d 25, 29 (4th Cir. 1973), quoting TARLTON v. CLARK, 441 F. 2d 384, 385 (5th Cir. 1971). We adhere to that position in this case."

The foregoing cases recognize the unique discretion committed to the United States Board of Parole under 18 U.S.C. § 4203[2], a statutory procedure similar in intent to N.C.G.S. 148-60.[3]

In SCARPA v. U. S. BOARD OF PAROLE, supra, the Fifth Circuit Court of Appeals clearly states the criteria applicable to parole consideration:

> "Many factors are necessarily involved in such determinations. The Board's final determination may be based on any or all the following: (1) length and seriousness of prior criminal record; (2) family history; (3) marital situation; (4) vocational and professional skills; (5) education; (6) physical conditions; (7) living habits in a free community; (8) behavior and progress while incarcerated. The Board possesses the expertise and experience for ascertain-

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2. 18 U.S.C. § 4203 reads in pertinent part:
"(a) If it appears to the Board of Parole from report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board release is not incompatible with the welfare of society, the Board may in its discretion authorize release of such prisoner on parole.

3. Supra at 11.

ing which factors are determinative from the unique situation presented by each applicant.

* * *

"Two underlying criteria guide the Board in its decision-making process. First, whether there is a reasonable possibility that the prospective parolee will remain at liberty without violating the law, and second, will such release be compatible with the welfare of society."

Just as a district court has no authority to order parole, GODOY v. U. S. BOARD OF PAROLE, 345 F. Supp. 1292 (C.D. Cal. 1972); UNITED STATES v. SUTTON, 346 F. Supp. 464 (D.C.D.C. 1972) — a federal court cannot interfere with the administration of the parole law unless the body administering it has acted arbitrarily or capriciously. PEOPLE OF THE UNITED STATES ex rel HARRIS v. RAGEN, 81 F. Supp. 608 (N.D. Ill. 1949), aff'd, 177 F. 2d 303 (7th Cir. 1949). As a matter of legislative grace, not constitutionally mandated, parole from a state conviction is neither federally required or protected. SWEETEN v. SNEDDON, 463 F. 2d 713 (10th Cir. 1972); MENECHINO v. OSWALD, supra.

III.

THE VERY NATURE OF THE PAROLE GRANTING PROCESS NEGATES THE REQUIREMENTS OF DUE PROCESS.

It has been well established that:

". . . due process is flexible and calls for such procedural protection as the particular situation demands. 'Consideration of what procedural due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action.'" CAFETERIA AND RESTAURANT WORKERS UNION v. McELROY, 367

U.S. 886, 895, as quoted by MORRISSEY v. BREWER, 408 U.S. 481.

Therefore, it is necessary to determine the precise nature of the Parole Commission's function. In HYSER v. REED, 318 F. 2d 225 (D.C. Cir. 1963), cert. denied. sub nom. THOMPSON v. UNITED STATES BOARD OF PAROLE, 375 U.S. 957 (1963), Judge (now Chief Justice) Burger stated for the Court sitting *en banc* that:

"The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and returned to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus, there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae* . . .

* * *

"Fundamentally the Parole Board's interest and its objective are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under . . . supervision as long as he is a good risk. . . ."

Before releasing an inmate and allowing him to reenter society, the Parole Commission has the awesome responsibility of deciding that this convicted felon has been rehabilitated to the extent that there is a "reasonable probability that the prisoner will live and remain in liberty without violating the law [and] that the release of the prisoner is not incompatible with the welfare of society. . . ." N.C.G.S. 148-60. This task

requires the Parole Commission to make a reasonable prediction concerning the inmate's future performance and abilities, as well as his readiness to be able to accept the responsibilities and accompanying strains in his attempts to readjust in the free community.

The Commission's concern is for the individual as well as for the safety of the community and the welfare of society. The Commission must determine that the inmate is sufficiently equipped to meet the demands of society on his own. It is imperative that the dual duties of the Commission be kept in mind in prescribing the procedural requirements which it is to follow in order to insure that the Commission is not frustrated in its attempt to make the best decision for the state and for the individual.

Petitioners believe that the present procedures of the North Carolina Parole Commission are constitutionally sufficient.[4]

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4. All 13,000 inmates in the custody of the Division of Prisons of the North Carolina Department of Correction are considered for parole when first eligible under N.C.G.S. 148-58 and, if parole is denied, are reconsidered at least annually thereafter.

Ninety days prior to the inmate's first parole eligibility date or on the next scheduled review date, the inmate's file is pulled and carefully studied by a case analyst. Based upon what the analyst finds in the file, the inmate will be recommended to the Commission for either parole denial or a preparole investigation.

If parole denial is recommended, the case comes before the Commission on what is known as the "case review" form which contains the reasons for the analyst's recommendation. The overwhelming majority of parole denial comes under "case review" because the files contain information that make it obvious that the inmate will not qualify for a parole at this point. For instance, the inmate may have a detainer against him and is awaiting trial on another charge. He may be on escape or a recently recaptured escapee; he may have several prison rules infractions that make him unqualified for parole under N.C.G.S. 148-60 or he may have a long prior criminal record which is such that the Commission is unable to conclude that there is a reasonable probability he will live and remain in liberty without violating the law.

If, during the case review, the analyst or any one Commissioner (out of a total of five) feels the inmate's case merits further investigation, a preparole investigation is ordered. At this point, an interview with one Commissioner is scheduled. Each week one Commissioner conducts these interviews at various prison units about the State. If a Commissioner, following an interview, recommends against parole, the case is presented to the full Commission and, if three Commissioners approve, the investigation is suspended, the inmate is denied parole, and a new review date is scheduled. If the interviewing Commissioner tentatively recommends parole, or any other Commissioner directs, the investigation is continued and, once this is completed, the case is presented to the full Commission for a vote.

At any time parole is denied, the inmate is notified in writing and is advised the reasons for denial. Where appropriate, the inmate receives suggestions to enhance parole probability at his next review. If the inmate, or any other interested person, questions the facts upon which denial is based, and an inquiry supports such contentions, the Commission will reconsider the inmate's case.

At any rate, Petitioners contend that the present procedures are far more appropriate to the non-accusatory parole granting function than is the type of adversary procedural format demanded by the Respondents.

In BRADFORD v. WEINSTEIN, supra, the District Court stated:

> "[A] parole revocation proceeding differs from a review by a Parole Board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an allegal violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society." *Id.* at 1131.

The nature of Parole Board hearings was also explained in MENECHINO v. OSWALD, supra, in which the Second Circuit Court of Appeals refused to extend the full panoply of due process rights in such cases.

> "It [the Board] must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoner, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and mental health, his in-

tra-personal relations with prison staff and other inmates, his habits and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return." *Id.* at 408.

In summary, Petitioners submit that the Due Process Clause should not read as requiring the North Carolina Parole Commission to extend to inmates procedural safeguards so extensive that the Commission would be prevented from weighing all the tangible and intangible factors which the Commission must consider in order to make a reasonable prediction as to the inmate's suitability for parole. The procedures must allow the Commission to perform its delicate predictive task without being hampered by unreasonably burdensome forms of practice. The procedural format which Respondents claim to be their due would needlessly impede the efficient operation of the North Carolina Parole Commission.

". . . The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on his suitability for parole. Further burdens would ensue with requirements of notice, procedures for the appointment of counsel and reporters, subpoeaning and cross-examination of witnesses, compensation of counsel and cost of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the Board of Paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The state is not constitutionally required to provide for the parole of prisoners, and if the plaintiff's demands were enforced, and the burden of the prison system became too great, the State might find it necessary or desirable to terminate the parole system." BRADFORD v. WEINSTEIN, supra, at p. 1132.

CONCLUSION

For the foregoing reasons we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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